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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 535.

GEORGE W. BEAVERS, *Appellant*,

against

WILLIAM HENKEL, *United States Marshal in and for the Southern District of New York.*

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a final order of the circuit court of the United States for the southern district of New York, dated November 11, 1903, which denies the appellant's petition for writs of *habeas corpus* and *certiorari* (fols. 188 to 190).

On November 10, 1903, the appellant presented a petition (fols. 1 to 7) to the circuit court of the United States for the southern district of New York, setting forth that he was a citizen of the United States; that he was then and there imprisoned and restrained of his liberty by one William Henkel, marshal of the United States for the southern district of New York, not by virtue of any decree or final order of a court of the United States or other competent tribunal, but under color of authority of the United States, by virtue of section 1014 of the Revised Statutes thereof,

evidenced by a warrant of removal dated November 10, 1903, and signed by the Hon. George C. Holt, a judge of the district court of the United States for the southern district of New York; that the restraint of the petitioner was without due process of law; that the alleged process under which he was held was wholly void and of no force nor effect; and that the said restraint was illegal and in violation of the rights secured and guaranteed to him under the Constitution of the United States of America.

Annexed to the petition and made a part thereof were the following exhibits:

1. The warrant of removal (fols. 7 to 10).

2. The commissioner's warrant to apprehend and to commit (fols. 10 to 15).

3. Complaint on removal (fols. 15 to 20).

4. Bench warrant, with certification by clerk (fols. 20 to 23).

5. Indictment found in the eastern district of New York, with certification by clerk (fols. 23 to 37).

6. Testimony taken before the commissioner, with exhibits offered in evidence, duly certified (fols. 37 to 180).

The record shows that there was filed in the circuit court for the eastern district of New York, on July 23, 1903, an indictment (fol. 31) charging the appellant, George W. Beavers, with violations of section 1781 of the United States Revised Statutes, and that on August 14, 1903, the clerk of the court issued a bench warrant for the apprehension of the accused if found within the eastern district of New York (fols. 20 to 22). Subsequently and on September 3, 1903, the accused not being found within the eastern district of New York, one Frank E. Little verified a complaint on removal

before Samuel M. Hitchcock, commissioner of the United States for the southern district of New York (fol. 19), who thereupon issued a warrant (fols. 10 to 12) to the marshal of the United States for the southern district of New York, directing him or his deputy to apprehend the said George W. Beavers, and to bring him forthwith before the said commissioner, there to be dealt with according to law.

On September 8, 1903, the accused was apprehended by the marshal, arraigned before the commissioner (fols. 12 to 13), and admitted to bail for his appearance from time to time before the commissioner, the accused when arraigned having demanded an examination (fol. 12), as was his right to do under section 1014 of the United States Revised Statutes. On September 15, 1903, the examination of the accused began. The identity of the accused was established (fols. 38 to 40). The prosecution offered in evidence a paper purporting to be a certified copy of the indictment in question (fol. 42), which was received by the commissioner over the objection of the accused (fols. 42 to 45), and rested (fol. 45).

After the defense had duly moved to dismiss the complaint (fol. 45) and the commissioner had denied the motion, the defense duly excepted to the ruling (fol. 64) and demanded that the prosecution announce the names of the witnesses that appeared before the grand jury which found the indictment.

This the prosecution declined to do, and upon the refusal of the commissioner to so instruct the prosecution the defense duly excepted (fol. 64). The witnesses, Edmund H. Driggs, George F. Miller, Harry F. Burns, Amy Wren, William J. Youngs, Frank E. Little, and John F. Oldfield, were all finally produced by the defendant before the commissioner, and demand was duly made by the defense upon the prosecution to call and examine the witness Driggs (fol. 127), and the declination of the prosecution to comply with this demand applied not only to the witness Driggs,

but to all the witnesses called (fol. 127). The witness Driggs was one of the persons from whom it was alleged in the indictment the appellant had improperly received money (fol. 30). It was also alleged in the indictment that the appellant had unlawfully received money from the witness George F. Miller (fol. 30). It appeared from the testimony of the witness Little (fol. 40) that he was the complaining witness, and was one of the Post-Office inspectors who had been assigned to investigate the actions of the accused. The testimony of the witness Oldfield likewise disclosed the fact that he, too, was a Post-Office inspector who had been assigned to work with the witness Little in the investigation to which reference has been made (fol. 163).

It was shown by the testimony of the witnesses Driggs (fol. 125), Burns (fol. 128), Wren (fol. 137), and Oldfield (fol. 174) that each had been in attendance upon the grand jury for the eastern district of New York which found the indictment which was made the basis of the removal proceeding. It was shown by the testimony of George F. Miller (fol. 128) that he was *not* before the grand jury which found the indictment in question, and by the testimony of Frank E. Little (fols. 150 to 161) that he had no personal knowledge of any of the facts alleged. But, in spite of the fact that the witnesses on whose testimony the indictment is presumed to have been found were produced before the commissioner and ample opportunity afforded to examine these witnesses, the prosecution refused to take advantage of the opportunity thus afforded to adduce before the commissioner primary evidence (if any there was) of the facts alleged in the indictment, preferring to rest its entire case upon the unsupported certified copy of the indictment.

The accused attempted to elicit from these witnesses testimony showing that they gave no evidence before the grand jury, or that such as they did give was incompetent and not sufficient on which to find an indictment, and to offer to the commissioner primary evidence in reference to the charge

contained in the indictment, and further to controvert all the material facts alleged in the indictment. None of this evidence was presented because objections by the prosecution to its introduction were sustained by the commissioner (fols. 125, 126, 128, 137–147, 149, 152–155).

On November 2, 1903, upon the termination of the examination of the witness Oldfield, the commissioner at once committed the accused to the custody of the marshal (fol. 180) to await the order of removal of the district judge.

The argument on the prosecution's application for a warrant of removal having been set for November 10, 1903, the district judge on this day, after hearing counsel for the accused, but without having before him the record of the proceedings had before the commissioner, ordered the removal of the accused to the eastern district of New York forthwith. After the district judge had granted the application for removal and while the appellant was in the actual custody of the marshal (fol. 9), the accused applied to the circuit court for writs of *habeas corpus* and *certiorari*, which application was denied on the 11th day of November, 1903, and this appeal was thereupon taken.

All points to be discussed upon this appeal relate to the jurisdiction of the commissioner to apprehend and to commit, and of the district judge to order the removal of the accused.

The contention of the appellant is that the certified copy of the indictment received by the commissioner as the sole evidence to sustain his finding of probable cause was not to be regarded as any evidence at all of the facts therein alleged, or as possessing any probative force; that the complaint on removal was jurisdictionally defective; and that it was competent for the appellant to controvert the allegations of the indictment by the sworn averments in his petition for the writ of *habeas corpus* in respect of those facts, the existence of which was necessary to give the commissioner jurisdiction. The errors duly assigned and now asserted

and relied upon by the appellant are as follows (fols. 199–201):

The court erred:

In denying the petitioner's writs of *habeas corpus* and *certiorari* and remanding him to the custody of the marshal.

In holding that said alleged indictment was properly admitted in evidence before the honorable commissioner, in proof of probable cause.

In holding that there was sufficient evidence of probable cause.

In holding that the warrant of removal made by the United States district judge for the southern district of New York was issued upon the finding of probable cause.

In holding that your petitioner was not then and there entitled to be discharged from the custody of the marshal.

In holding that the said commissioner at the time of the arraignment of your said petitioner before him, or at any other time, had any jurisdiction, right, or authority to require bail of your petitioner, or to commit your said petitioner in default of such bail.

In holding that your petitioner was in custody of the said William Henkel, United States marshal in and for the southern district of New York, and deprived of his liberty by him by due process of law.

ARGUMENT.

I.

The controlling questions to be discussed on this appeal are whether the indictment offered in evidence before the commissioner can be regarded as conclusive evidence against the accused of the facts therein alleged; whether it was competent at all as evidence of such facts, and whether such indictment was entitled to be accorded any probative force whatever.

When the defendant was arraigned it was the duty of the commissioner to inquire as to the identity of the accused, whether a crime had been committed, and whether there was probable cause to believe the defendant guilty of the crime charged.

Section 1014 of the United States Revised Statutes, under which these removal proceedings were instituted, provides as follows:

"For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is

imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

This section establishes the practice of the State where the examination is held as the practice in conformity to which the examination must be conducted. Proceedings instituted under section 1014 are in all respects similar to criminal proceedings instituted before a committing magistrate in the State where the arrest is made and should be governed and controlled by the rules of procedure in force in the State where the arrest is made, and the same rules of evidence applied. This is perfectly clear, both from the language of the section and from the decisions of the courts construing its meaning.

Thus Judge Brown in the Dana case said:

"Although the State rules of evidence are not applicable in criminal proceedings in Federal cases, unless Congress has so provided, the above clause of section 1014 sufficiently shows the intent of Congress in this instance. It also imports that the rules of procedure to be followed in proceedings under section 1014 are those in force in the State and at the time and place of the removal proceeding."

Re Dana, 68 Fed., 886, p. 893.

This has been established by a long line of well-considered cases (U. S. *vs.* Rundlett, 2 Curt., 42; U. S. *vs.* Case, 8 Blatchf., 251; U. S. *vs.* Horton, 2 Dill., 94; U. S. *vs.* Brawner, 7 Fed., 86, 90; U. S. *vs.* Martin, 17 Fed., 150, 156; *Re* Burkhardt, 33 Fed., 25, 26; U. S. *vs.* Greene, 100 Fed., 941).

In U. S. *vs.* Rundlett (*supra*) Judge Curtis regarded the words of the 33d section of the judiciary act "agreeably to the usual mode of process against offenders in such State" as synonymous with mode of proceeding, and stated it as his opinion that it was the intention of Congress by these words "to assimilate all the proceedings for holding accused persons to answer before a court of the United States, to the

proceedings for similar purposes by the laws of the State where the proceedings should take place" (2 Curt., 44).

Judge Woodruff, of the northern district of New York, approved Judge Curtis' opinion in the Rundlett case and said that it was quite clear that he had correctly construed the 33d section of the judiciary act (U. S. *vs.* Case, 8 Blatchf., 250, 251).

In U. S. *vs.* Horton, 2 Dill., 94, 97, Circuit Judge Dillon took occasion to say:

"Congress has not seen fit to prescribe a uniform mode of its own in respect to preliminary proceedings against persons accused of a violation of its criminal enactments, but in the 33d section of the judiciary act it provided that the procedure in such cases be agreeably to the usual mode of process against offenders in such State"—

that is, in the State in which the offenders may be arrested and the proceedings had.

In U. S. *vs.* Brawner, 7 Fed., 86, 90, the learned district judge held that it seemed to be the plain requirement of the statute (sec. 1014) that the State practice of preliminary examinations should prevail.

In U. S. *vs.* Martin, 17 Fed., 150, 151, it was said:

"A commissioner acting under the statute is simply a committing magistrate. The ambiguous phrase 'mode of process' is interpreted to mean 'mode of proceeding' and this proceeding is according to the law of the State in similar cases. The validity of the process and order in question must then be determined by reference to the law of Oregon for the arrest, examination and commitment of persons charged with the commission of crime against the laws of the State."

Judge Brown reiterated the views expressed by himself in the Dana case, in the case of United States *vs.* Greene (*supra*), where he said (100 Fed., p. 943):

"In that decision it was pointed out that the proceeding for commitment and removal under section 1014 is an orig-

inal proceeding, to be conducted according to the laws of the State in similar proceedings before committing magistrates; that the object of the proceeding is to enable the commissioner to ascertain *for himself* whether from the proof of facts and circumstances produced before him, there is probable cause to believe the defendants guilty of the offense charged."

Decisions to the same effect could be multiplied and cited at length, but the proposition is now so well sustained by authority that it must be deemed to be conclusively established.

It being established that the State practice should be followed in these proceedings, reference must be made to the practice existing in the State of New York.

The provisions of the New York Code of Criminal Procedure relating to preliminary examinations of accused persons begin with section 188.

This section provides that when the defendant is brought before a magistrate upon an arrest, on a charge of having committed a crime, the magistrate must immediately inform him of the charge against him and of his right to the aid of counsel in every stage of the proceedings and before any further proceedings are had.

Section 194 provides that—

"At the examination the magistrate must in the first place read to the defendant the depositions of the witnesses examined on the taking of the information and if the defendant requests it or elects to have the examination must summon for cross-examination the *witnesses so examined, if they be within the county.* He must also issue subpœnas for additional witnesses required by the prosecutor or defendant."

"The witnesses must be examined in the presence of the defendant and may be cross-examined in his behalf."

Section 195.

"After the waiver of the defendant to make a statement or after he has made it, his witnesses if he produce any, must be sworn and examined."
Section 201.

"After hearing the proofs, and the statement of the defendant if he have made one, if it appear, either that no crime has been committed, or *that there is not sufficient cause to believe the defendant guilty thereof*, the magistrate must order the defendant to be discharged." * * *
Section 207.

Express authority to issue *subpœnas duces tecum* is conferred upon committing magistrates by section 613.

It is clear from the provisions of the State code quoted that it is the duty of the committing magistrate to determine *for himself* whether or not a crime has been committed, and whether, from the evidence adduced before him, there is sufficient cause to believe the defendant guilty thereof.

The history and growth of these provisions are dealt with by Judge Brown *In re* Dana, 68 Fed., 886–894, where he says:

"At common law a magistrate could not lawfully commit except upon oath. When the witnesses were brought before him, he was required to take their depositions as to the facts and circumstances within their knowledge showing criminality; the defendant had long acquired the right to cross-examine the complainant's witnesses and to produce witnesses on his own behalf; and on the facts thus ascertained, the magistrate was to determine the question of probable cause (1 Chit. Cr. Law, 33, 34, 78, 79; 1 Tayl. Ev., Sec. 484, note 2). Provisions to this effect were early incorporated in the statutes of New York, were re-enacted in the Revised Statutes (2 Rev. St., 706), and are all stated in fuller detail in the existing Code of Criminal Procedure, adopted in 1881 (Laws 1881, c. 442; Code of Criminal Procedure, sections 148–150, 194, 207, 208). If a magistrate commits upon oath of belief or suspicion only, without any statement of facts and circumstances showing probable guilt, he is liable to an

action for false imprisonment (1 Chit. Cr. Law, 34; Blodgett *vs.* Race, 10 Hun., 132; see *In re* Rothaker, 11 Abb. N. C., 122)."

Judge Brown, in commenting upon the unexplainable rulings of the commissioner in the Greene case, by which he rejected practically all the evidence offered by the accused, said (page 943):

"Precisely opposite was the ruling of this court in the Dana case, where it was shown, as I have said, that by section 1014 (the sole authority in the Federal courts for commitment or removal in such cases) the proceeding before commissioners must be in conformity with the existing State procedure. * * *

"In States, therefore, where the accused has no right to examine witnesses in his own behalf before a committing magistrate, he cannot do so in proceedings under section 1014; but in other States, as in New York, where this right does exist and is in daily practice it cannot be lawfully denied him. In New York the right of the accused to produce witnesses in his own behalf before committing magistrates was confirmed by express statute more than 70 years ago and more than 40 years before the re-enactment of section 1014 of the United States Revised Statutes; and such is the uniform course of procedure. * * * This practice is ancient" (Dalt. Just. (1742), c., 165; 1 Chit. Cr. Law, 79.)

"The existence of an indictment in another jurisdiction has no bearing upon the application of this statute to proceedings for commitment or to the course of the examination, when an examination is demanded pursuant to the statute, nor upon the commissioner's duty to take whatever competent evidence is offered by the defendant tending to show the want of probable cause and for that purpose and to that extent, the proceeding is of necessity, like the proceedings before the State magistrates, a *partial preliminary hearing on the merits.* * * * In proceedings under that section therefore, the commissioner must receive all evidence touching probable cause of guilt, that a State committing magistrate would be bound to take without reference to any subsequent trial upon indictment.

"The objection that this would be 'trying the issue' is premature. There is no 'issue' as respects the indictment until the defendants are committed, removed, and arraigned, and plead not guilty. The inquiry before the commissioner is for the very purpose of ascertaining whether there is sufficient ground to commit and remove the accused and oblige him to plead and stand trial, and to enable him under the State statute to arrest the proceedings *in limine*, if he can, by proving that there is no probable cause for the accusation. That was the only 'issue' before the commissioner on this hearing. In New York the statute above cited has been followed in the Code of Criminal Procedure by still further provisions designed to safeguard accused persons from arbitrary, mistaken, or malicious commitments" (sections 188–214).

"And in the absence of some act of Congress expressly dispensing with any other evidence than the indictment itself, as in extradition proceedings, it is impossible that in a proceeding under section 1014, which makes applicable the State laws, the rights of citizens expressly guarded by the State laws can be set aside by a mere indictment in a distant jurisdiction; so that without a word in their own defense citizens could be thereupon transported for trial hundreds or even thousands of miles away from their homes in contravention of the act of Congress and the laws of the State, which it recognizes and adopts. Such a proceeding would be not merely erroneous but illegal."

The most casual inspection of the transcript of record now before the court will show how wide was the departure from these rules upon the so-called preliminary hearing accorded the appellant.

The defendant having been arraigned, the Government after establishing his identity offered in evidence a certified copy of an indictment found against him in the eastern district of New York, which was not indorsed with the name of any witnesses. This was all the "evidence" presented against the defendant, and it was upon this alone that the commissioner found that a crime had been committed, and that probable cause existed for believing the defendant guilty of the crime charged.

The contention which the appellant now urges is that the indictment was not evidence and was incompetent and inadmissible as such and had no probative force whatever, and since under the provisions of the New York Code of Criminal Procedure relating to the preliminary examination of accused persons (quoted supra) the appellant was entitled to have the witnesses that were within the county examined in his presence and produced for cross-examination, and since it appears from the record that the witnesses Little, Oldfield, Driggs, Miller, and Harry F. Burns were all within the county, were actually present before the commissioner, and that demand was duly made on behalf of the appellant that the prosecution examine these witnesses in the presence of the accused and submit them for cross-examination, and as it likewise appears that the prosecution refused to examine the said witnesses, and that the commissioner refused to direct the prosecution to examine them, to all of which exception was taken, it follows, therefore, that the defendant was deprived of his liberty without due process of law, that he was and is held without lawful warrant, contrary to the Constitution of the United States, and that the several orders that were made respecting his custody, which were all based upon this proceeding, were absolutely without jurisdiction and void.

An indictment is defined by Blackstone as "a written accusation of one or more persons of a crime or misdemeanor, preferred to and presented upon oath by a grand jury" (4 Bl. Com., 302).

An indictment is not evidence or proof of the facts stated in it. It is a mere pleading containing the charge or accusation to which a defendant must make answer. To consider it as evidence of the truth of the allegations contained in it is to substitute accusation for proof. To regard an indictment not indorsed with the names of witnesses as competent evidence of the facts alleged in it, is to abrogate the rule requiring a magistrate or commissioner to take proof that a crime has been committed and of the existence of

probable cause to believe the accused guilty. When one is charged with an offense his guilt cannot be demonstrated by re-accusation. A charge cannot be held to be evidence of guilt. A charge or accusation cannot be made proof or evidence of the facts stated in it by calling it evidence. However it may be characterized or whatever it may be called, it is nevertheless a mere pleading containing an accusation. To permit such an accusation, when it is not indorsed with the names of the witnesses who appeared before the grand jury, to be considered as evidence which justifies the removal of a citizen from one Federal district to another, is absolutely to destroy the liberty of the citizen. A citizen ought not to be subject to removal from one end of this country to another merely because an indictment has been found against him. To separate a man from his home, his business interests, and remove him to a distant State simply because some one, whose name he is not even permitted to know, has accused him of a crime is repugnant to the principles of justice. This is the principle involved in this case. If a man can be removed from one district to another district in the same State merely upon an indictment unindorsed with the names of the witnesses who appeared before the grand jury, it follows that he can be removed to a district in a distant State. *Section* 1014 *of the United States Revised Statutes provides for the procedure to be followed upon removal, not from one State to another, but from one district to another.*

The principle for which the Government is contending in this case is that a citizen can be removed to a distant State upon a mere accusation being made against him in the State to which removal is sought, without any proof being presented that a crime had been committed, or that there is any evidence at all to believe him guilty, and without any proof that the accused was in the district when the crime was committed. This assault upon the liberty of the citizen

is to be made without even informing the accused of the name of his accuser.

This court has never had occasion directly to pass upon the question now presented. In the Dana case Judge Brown stated that an indictment which was not indorsed with the names of the witnesses who appeared before the grand jury could not be considered as sufficient evidence to justify the removal of a citizen from one district to another.

In United States *vs.* Greene (100 Fed., 941; 108 Fed., 816) Judge Brown held that an indictment was not conclusive evidence of the facts stated therein, even though indorsed with the names of witnesses, and in Green *vs.* Henkel (183 U. S., 241) no doubt was suggested by this court as to the correctness of these views.

In view of the decisions of Judge Brown and the fact that they were generally recognized as expressing correctly the existing law on this subject, an attempt was made to have Congress amend the law so as to provide that a certified copy of an indictment should of itself be competent and sufficient evidence to justify a removal.

The grand jury of the eastern division of the southern district of Georgia, feeling incensed at the determination of the Gaynor and Greene cases, made in New York, filed a special presentment petitioning Congress to amend section 1014 of the United States Revised Statutes so that the removal might be secured upon the presentation of a certified copy of an indictment and proof of the identity of the accused.

The text of the proposed amendment which was introduced into Congress is added to this brief in the appendix. The proposed amendment was at the time extensively commented upon and public hearings were had, and after full investigation and discussion Congress refused to make the proposed amendment (*Congressional Record*, April and May, 1900; *New York Law Journal*, April 28, 1900; *New York Evening Post*, April 24, 1900; *New York Sun*, April 25, 1900, May 4 and 5, 1900; *New York Times*, May 7, 1900).

The effort of the Government in this case is to effect a change in the law by judicial construction which the legislative branch of the Government deliberately refused to make.

No useful purpose can be served by creating by judicial construction the practice for which the Government contends in this case. The orderly administration of justice will in no way be facilitated by it. On the contrary, both the orderly administration of justice and the protection of the rights of citizens require that evidence establishing the existence of probable cause should be presented before a citizen is subjected to removal into another district.

The doctrine that a certified copy of an indictment is to be regarded as competent evidence of the facts therein alleged outside the district in which it was found, so as to dispense with further proof of criminality, seems first to have been announced in 1871 by Judge Lowell in Alexander's case (1 Lowell's Dec., 530). That case arose in Massachusetts, and the only evidence of guilt was a certified copy of an indictment returned to the circuit court of the United States for the district of Louisiana.

Judge Lowell, in holding this enough to authorize the issue of a warrant, said:

"Although it has been usual in England and America to examine witnesses before the committing magistrate in the presence of the accused, yet this has never been an essential prerequisite for holding an accused person for trial. He might always be arrested upon the warrant of a coroner or of a court upon an *ex parte* examination before a coroner's jury or a grand jury. The indictment in the district in which it is found is an *ex parte* proceeding, but since it is found upon oath and after the examination of witnesses it has a presumption of validity. *Before the commissioner it is only a piece of evidence, to be sure, and may be met and controlled, but when it stands by itself and uncontradicted, it seems to be enough, according to our practice, to authorize the warrant.*"

The only point that appears to have been urged by counsel in Alexander's case was that the defendant was, under the Constitution, entitled to be confronted by the witnesses against him on a preliminary hearing. This argument was answered by the indisputable proposition that since the constitutional right to be confronted by witnesses does not arise until trial, unless the right is accorded the accused by a statute of the State where the preliminary hearing is being conducted, as is the case in the State of New York, an indictment is not objectionable as evidence merely on the ground that it is *ex parte* in character. But the court went further and decided that since an indictment is presumably found on sworn testimony, it must be regarded of itself, standing alone and uncorroborated, *outside the jurisdiction within which it was found*, as a "piece of evidence" of the facts therein alleged, sufficient to rebut the presumption of innocence and justify the removal of the accused.

That this ruling was out of harmony with all settled rules of evidence, was supported by no recognized principle of law, and was founded only on considerations of convenience, was subsequently admitted with amazing frankness by the very judge propounding it in United States *vs.* Pope, 24 U. S. Inter. Rev. Rec., page 29. Commenting there on his own decision in Alexander's case, Judge Lowell remarked:

"The usual course is to produce either witnesses or affidavits in behalf of the United States. It has been seriously doubted whether a copy of an indictment is evidence on such an examination. I decided in Alexander's case that it is. This was a very convenient decision for the United States and a sound one, *but it rests rather on long usage than on any principle of law. Because, generally speaking, an indictment is evidence of nothing but its own existence, unless there is some statute giving it greater effect. It is but secondary evidence after all, or rather a statement of the result of evidence, and the better practice is to give primary evidence of criminality.*"

Such is the view of the judge who propounded the doctrine that a certified copy of an indictment is to be regarded as a "piece of evidence" of the facts therein alleged outside the jurisdiction in which it was found. No principle of law justifies his decision. Generally speaking, an indictment is evidence of nothing but its own existence. No statute gives it greater effect. It is only the result of evidence. The better practice is to give primary evidence of criminality. Yet in spite of all this, presumably for reasons of "convenience to the United States," it is to be regarded as *evidence* of the guilt of the party accused.

It is believed that to these two decisions, supported by no stronger reasoning than the foregoing, may be traced the subsequent cases in the Federal Reports, where it has been intimated, generally by way of dicta, that a copy of an indictment, outside the jurisdiction where it is found, is evidence of the truth of the facts therein averred:

(U. S. *vs.* Haskins, 3 Saw., 265; *Ex parte* Clark, 2 Ben., 540; U. S. *vs.* Dana, 68 Fed., 886; U. S. *vs.* Rogers, 23 Fed., 658; U. S. *vs.* Fowkes, 49 Fed., 50; *In re* Buell, 3 Dillon, 120; opinions of Miller and Love, JJ., in 1 Wool. C. C., 423.)

It is, of course, common learning that an indictment, within the jurisdiction where found, so far supplants the necessity of proof of probable cause, supported by oath or affirmation, as to justify a committing magistrate in holding a person for trial thereon without additional proof of criminality. Such is conceded to be the rule of the common law. It is also conceded common law that a warrant for the apprehension of a fugitive, when "backed" in the county where it was sought to be executed, might be executed therein without other formalities and the offender summarily conveyed back to any county in the United Kingdom within which the indictment was found or the warrant issued (4 Blackstone Comm., ch. 21, page 292).

A similar practice, permitting the execution of the warrant of a United States judge anywhere within the United

States, was contended for in the early history of the Federal judiciary, and was even sustained by an opinion of Attorney General, afterward Mr. Chief Justice Taney (2 Op. Att. Gen., p. 564; 11 *id.*, p. 527). And it may be conceded that it might be competent for Congress to make the bench warrant of a United States judge run into any Federal district, thus obviating the necessity of a hearing before a United States commissioner in the district wherein the accused was found. Or it might be competent for Congress by an express statute to make a certified copy of an indictment competent evidence of the facts therein alleged, as the legislatures of certain States have done, and as Congress has seen fit to do in cases of extradition and interstate rendition (R. S., secs. 5271, 5778; Cal. Cr. Code, sec. 1550).

But the complete answer to both of these propositions is that Congress has adopted neither the one course nor the other. (See opinions of Lacombe, J., in Price's case, 83 Fed., 830, and of Brown, J., in U. S. *vs.* Greene, 100 Fed., 944). Instead, it has, by a statute, dating from the inception of our judicial system, committed to United States commissioners or to district judges sitting as such the determination of the question as to the existence of probable cause to believe the person accused guilty of a crime.

We have the high authority of Mr. Chief Justice Marshall for the statement that such a determination must be made on legal evidence such as a court or jury might hear (*Ex parte* Bollman, 4 Cranch, 75).

It is the contention of this appellant that there is no statute, and no usage, and no principle of law, and no sound reason which demands or warrants the rule that a certified copy of an indictment is to be regarded as legal evidence of any fact whatever, except the single fact that an indictment has been found in the district from which it emanates.

Judge Lowell's decision in Alexander's case was erroneous in failing to appreciate the distinction between the effect of an indictment at common law, as dispensing with any pre-

liminary evidence at all in the district or county wherein it was found, so as to justify holding the accused for trial, and the effect of an indictment itself as legal evidence in another jurisdiction before an officer proceeding under a specific statute. This distinction was pointed out in forcible and appropriate language by Elihu Root, Esq., in his argument in the Dana case, in the course of which he said:

"Undoubtedly the fourth amendment is to be considered in conjunction with the fifth amendment which incorporates the common-law grand jury into the Federal system, and it may well be that within the limits of efficacy and operation of the common law grand jury, an indictment takes the place of the oath or affirmation required by the fourth amendment. But the grand jury at common law was confined to the particular jurisdiction within which it was created and from which its members were drawn. Its finding had no force or effect whatever beyond the limits of that jurisdiction. An indictment found by such a grand jury was no basis whatever for the issue of a warrant outside of the line of that jurisdiction, and there is no warrant to be found in the Constitution or any principle or any statute or any usage for asserting that the incorporation of the grand jury in the Federal system by the fifth amendment authorizes a departure from the fundamental principle that no warrant shall issue except on probable cause supported by oath or affirmation."

After quoting at length from the opinion of Judge Lowell in United States *vs.* Pope, 24 U. S. Internal Revenue Records, page 29, and in Alexander's case, 1 Lowell, page 530, and pointing out the fact that the constitutional question involved was not argued before Judge Lowell in these cases, Mr. Root's argument proceeds:

"I submit that the ruling goes too far in the effect which it gives to the indictment; that it does not discriminate between the effect of an indictment in the jurisdiction in which it is found and the effect outside the jurisdiction, and that Judge Lowell ought not to have gone so far as to make it even evidence of any description outside the jurisdiction.

When the constitutional provision which I cite has been applied to the custom on which he relies and which he frankly says is not sustained by any principle of law, that custom must fail."

In determining the weight to be accorded to this indictment it should be borne in mind that it was found without any preliminary hearing being accorded the accused in the district where the crime is alleged to have been committed. This is not a case where such a preliminary hearing is had before the magistrate and then the defendant flees from the jurisdiction where such hearing was had. In this case the Government preferred the irregular method of securing an indictment before any charge was made before a commissioner to determine whether the defendant should be held to await the action of the grand jury.

In reference to the value of indictments found under such circumstances as evidence, District Judge Butler, in United States *vs.* Fowkes, 49 Fed. Rep., 50, said:

"Here, however, the circumstances are extraordinary. *The indictment, as we have seen, was found at the instance of the prosecuting attorney without previous commitment or binding over; and the relator has consequently never had opportunity to know anything of the circumstances out of which the alleged crime is supposed to arise, or the nature of the evidence by which it is to be proved;* and it is proposed to transfer him under these circumstances to a distant State for trial, while the undisputed testimony before me seems at least to justify the belief not only that he did not but also that he could not commit the offenses charged in Missouri or indeed elsewhere. In view of the circumstances under which the indictment was found, I do not regard it as entitled to any greater weight than a magistrate's commitment after hearing. I doubt whether it is entitled to as much. The practice pursued in obtaining indictments, where there has been no commitment or binding over (which is so well understood that I must take judicial notice of it) is to prepare the bill on information furnished and without commanding that the court present it to the grand jury, which has not been instructed respecting the crime charged and pre-

sumably is ignorant in many cases of its essential constituents. The Government claims a right to pursue this practice, and I am not called upon to question it. When, however, indictments so obtained are presented as authority for imprisoning men and transferring them to distant States to stand trial among strangers, the circumstances under which they are obtained must be considered in determining their value and effect. I think the jury's finding in such case may be regarded as little more than a matter of form. It is not improper to say in passing that the practice is in my judgment attended with serious danger to the rights of individuals, inasmuch as it affords convenient opportunity for the perversion of criminal process to the advancement of private interests."

The court further said:

"Without regard, however, to the circumstances under which indictments are found, the courts will go behind them whenever it appears that the relator's safety or unjust imprisonment requires it. The right to personal liberty is too important to be overborne by anything short of evidence that it has been forfeited. Mere matters of form and considerations based on notions of comity between courts have no proper place in trials on *habeas corpus*."

But, even in according to an indictment the force of legal evidence of crime, all the courts have always conceded that it is, and can be at best, nothing more than secondary evidence, and can be regarded in its most favorable light only as the affidavit of the witnesses on whose testimony it was obtained. *This indictment failed to comply with the plainest requirements for the admission of secondary evidence in any court of law.*

In the matter of Dana (68 Fed. Rep., 886) the nature of an indictment as evidence was considered by Judge Brown. It was there held "that an indictment which presents a clear and consistent statement of facts is equivalent to an affidavit thereof upon the faith of the witness endorsed on it, where other evidence of the facts is not conveniently attainable."

Thus, to attain even to the dignity of secondary evidence, three requirements are absolutely essential:

1st. That the names of the witnesses whose affidavit it is presumed to be shall be indorsed upon it;

2d. That the indictment shall present a clear and consistent statement of facts; and,

3d. That primary evidence be not conveniently attainable.

The indictment offered in evidence in this case lacks each of these essential requisites. To consider an indictment as evidence of the facts stated in it, under any circumstances, is to depart from its original purpose, to put it to a use for which it was not intended, and to greatly enlarge its scope and functions. To consider it as *secondary* evidence is to substitute accusation for proof when primary evidence is not at hand. To admit it as *secondary* evidence is to hold that when primary evidence cannot be introduced, proof of the commission of a crime and the existence of probable cause is to be dispensed with. To consider it as secondary evidence is open to almost all the other objections which exist against considering it as *primary* evidence.

But the indictment offered in evidence in this case and upon which alone the removal of the appellant is sought and which was regarded as conclusive evidence, which the appellant was not permitted to controvert, does not attain even the dignity of secondary evidence. *It is not indorsed even with the name of a single witness.* An indictment is only to be considered as secondary evidence when the names of the witnesses are indorsed upon it. The legal presumption which enables it to be considered even as secondary evidence arises from the fact that the witnesses' names are indorsed upon it. The presumption indulged in such cases is that the indictment contains a statement of the facts testi-

fied to by the witnesses whose names are indorsed upon it. Without this legal presumption the indictment could not be considered at all. Without the witnesses' names being indorsed upon it, the *essential fact* from which the presumption arises does not exist and the indictment is a mere pleading.

In the Dana case Judge Brown said that it was his opinion that an indictment "may be regarded as equivalent to a deposition of the facts ascertained by the grand jury upon the sworn examination of the witnesses whose names are indorsed on it, *and as such sufficient evidence for the issue of the warrant of arrest, under section 1014, when other evidence of the facts is not conveniently attainable.*"

In this case it was absolutely unindorsed with the name of any witness. It was regarded as not only sufficient "for the issue of a warrant of arrest under section 1014," but it was regarded as *conclusive evidence*, which the appellant was not permitted to controvert; justifying not merely the issue of a warrant of arrest, but a warrant of removal.

It was so regarded without any proof that "other evidence of the facts is not conveniently attainable." The prosecution not only failed to call such evidence, but the commissioner refused to allow the accused to interrogate witnesses who admittedly had been before the grand jury. An examination of the printed record will disclose that the accused was not accorded a preliminary hearing in any fair sense. It was a hearing in form merely.

The prosecution refused to announce the names of the witnesses that appeared before the grand jury (fol. 64).

The defendant was accused of making a fraudulent contract. Not only did the prosecution refuse to produce the contract or give any evidence in reference to it, but they successfully frustrated every attempt by the accused to secure its production. Little, a witness called by the Government to establish the identity of the defendant, avoided service (fols. 122–123), so that it was only after the greatest difficulty that he was finally served. Mr. Driggs was called

and testified that he attended at a session before the grand jury in the eastern district of New York in July, 1903 (fol. 125). The prosecution declined to examine him (fol. 127). An attempt was made by the defendant to show that no evidence at all was given before the grand jury which found the indictment against the defendant, but he was not permitted to do so (fols. 126, 127). Harry F. Burns testified that he was before the grand jury in connection with the case of U. S. *vs.* George W. Beavers. The defendant attempted to show by this witness that he gave no evidence before the grand jury upon which, taken alone or in conjunction with others, an indictment could lawfully be found (fol. 129). This the defendant was not permitted to do. The accused did not attempt to confine his examination of the witnesses called to what transpired before the grand jury. Every effort was exerted by counsel in his behalf to ascertain what facts bearing upon the issues were within the knowledge of the witnesses.

Questions which, if answered favorably to the accused, would have affirmatively established the absence of probable cause to believe the accused to be guilty of the crimes charged, and have contradicted the facts alleged in the indictment, were excluded by the commissioner upon the objection of the prosecution in the same way in which he excluded answers which would have disclosed what, if any, testimony was given by the witnesses before the grand jury (fols. 152–157, 172–174). Thus all attempts on the part of the defendant to introduce primary evidence were frustrated.

Amy Wren, the stenographer of the grand jury, who attended its session in July, 1903 (fol. 137), was not permitted to disclose the names of those who attended before it as witnesses while the matter of The U. S. *vs.* Beavers was under investigation (fols. 139, 140). The defendant made every possible effort by the examination of this witness (fols. 137 to 147) to ascertain the names of the wit-

nesses who appeared before the grand jury, so as to call them and show, not what they did or said before the grand jury, but to show that they could not furnish evidence against this defendant, and to controvert the facts alleged in the indictment.

Mr. Youngs, the district attorney of the eastern district of New York, where the indictment was found, was called as a witness. Any documentary evidence relating to the fraudulent contract which the defendant was accused of making must have been in his possession or under his control. The commissioner before whom this pretended or sham hearing was had refused to direct the production of these papers, or to permit any question in reference to them or to permit the district attorney to disclose the names of the witnesses who appeared before the grand jury while the matter of The U. S. *vs.* Beavers was under investigation (fol. 149).

From the examination of the witness Little, upon whose complaint the proceeding was instituted, an attempt was made to show that the defendant never made or signed any agreement or contract with the Edward J. Brandt-Dent Company. All questions relating to this subject, the answers to which alone would not only have furnished primary evidence which would have made the introduction of the indictment as evidence unnecessary, but which would have established conclusively the innocence of the defendant and controverted the facts alleged in the indictment, were prohibited (fols. 152, 155). Questions of the same general character were put to the witness Oldfield, and similar rulings were made.

The idea which seems to have actuated the prosecuting attorney and the commissioner was that every act which transpired before the grand jury and all the testimony that was given before that body necessarily was, by virtue of that fact alone, so highly privileged that it could not be repeated nor disclosed. In other words, both of these officials held the view, and the whole examination proceeded upon the

theory, that all the proceedings had before the grand jury were, for all purposes and notwithstanding every reason which could be urged to the contrary, absolutely sacred (fols. 126, 127, 129, 137–147).

This view is in direct conflict with the authorities upon the subject.

It was formerly held that the proceedings of a grand jury were not open to subsequent examination, but every avenue should be closed which should lead to a scrutiny of their transactions. Doubtless this obligation of secrecy exists, so far as concerns the actual deliberations of the grand jury itself or the manner in which individual jurors voted.

But it has been held in a number of cases, in the Federal courts and in the courts of the several States, that the fact that a witness testified, the nature of his testimony itself, as well as any irregularity or improper conduct in the grand-jury room, are open in a proper case to full and free judicial investigation.

And in every case where the disclosure of these proceedings is necessary to protect the rights of the accused or any other person they are open to judicial inquiry for this purpose.

In U. S. *vs.* Coolidge, 2 Gall., 363 (1815), on a motion to quash the indictment. Judge Story received in evidence the affidavit of a witness that his testimony before the grand jury was not under oath. In this case the court said:

"It is of the highest importance that this institution be preserved in its purity and that no citizen be tried until he has been regularly accused by the proper tribunal."

In Burdick *vs.* Hunt, 43 Ind., 381, it is said that there is no sufficient reason why the prosecuting attorney may not be called upon in a court of justice to disclose evidence given or proceedings had before a grand jury.

In Low's case, 4 Greenl., 439, the grand jurors were permitted to testify that they acted under the mistaken im-

pression that it was sufficient if a majority of the jurors concurred in finding a bill and twelve had not concurred.

These cases arose on motion to quash the indictment.

In Hunter *vs.* Randall, 69 Me., 183, in a civil action for malicious prosecution the plaintiff offered to prove the fact that certain witnesses testified before the grand jury, and showed by the testimony of the county attorney what these witnesses stated to the grand jury. This evidence was held admissible on appeal, the court holding that "the fact that a witness testified before the grand jury and the testimony given by him when otherwise competent, may be proved when the evidence is required for the purposes of public justice or the establishment of private rights."

Again, it has been held by a long and familiar line of authorities in New York and other States that a defendant may be entitled to an inspection of the minutes of the grand jury in a proper case shown, even when he contends that the evidence on which the indictment was found is insufficient in law to sustain it, and these authorities hold that the fact that the defendant was indicted without preliminary examination is a strong inducement to the court to look with favor on such an application (People *vs.* Molineux, 27 App. D., 60; People *vs.* Naughton, 38 How. Pr., 430; People *vs.* Bellows, 1 How. Pr. (N. S.), 149).

In People *vs.* Molineux, this language was used by Judge Blanchard:

"The defendant's counsel in his moving affidavit makes allegations which in effect charge that the indictment in question was found upon evidence that is insufficient in law to sustain it and insist that the defendant should not be put to the expense, notoriety and ignominy of a public trial without first being allowed an opportunity to ascertain whether the testimony before the grand jury was sufficient to establish a *prima facie* case against him in the eyes of the law, upon which he can be legally put to his defense. This contention of the defendant is sustained by abundant authority. *If the indictment was found without sufficient legal*

evidence to sustain it, it is not an indictment in contemplation of law, and cannot stand" (Code Cr. Pr., 256, 258; Peo. *vs.* Clark, 8 N. Y. Cr., 169; Peo. *vs.* Brickner, *id.*, 221; Peo. *vs.* Met. Trac. Co., 12 *id.*, 405).

These cases show that inquiry into the proceedings of a grand jury is by no means to be had only by a motion to inspect the minutes, but may be made in any way that justice demands—in a motion to quash the indictment, by motion in arrest of judgment, or even in a civil suit.

The whole subject of the secrecy of the proceedings of the grand jury received careful and extensive consideration in the case of U. S. *vs.* Farrington, 5 Fed., 341, which arose in the northern district of New York.

This was a motion to quash the indictment because an attorney had appeared before the grand jury with exhibits, bank books, and had argued the case before them, and other incompetent testimony had been introduced.

Wallace, D. J., granting the motion, reviewed the authorities and made these conclusions:

"It is the duty of the court in the control of its proceedings to see to it that no person shall be subjected to the expense, vexation and contumely of a trial for a criminal offense unless the charge has been investigated and a reasonable foundation shown for an indictment or information. It is due also to the Government to require before the trial of an accused person a fair preliminary investigation of the charges against him. The cases are frequent, where after all these precautions have been observed, it appears upon the trial that the Government has been subjected to discredit and expense which might have been avoided if there had been a more careful preliminary investigation.

"Notwithstanding the reasons which exist for insisting upon a rigid adherence to this practice in the interests of decorum, economy, and justice, it has been zealously maintained that so confidential and sacred should the proceedings of a grand jury be considered that every avenue should be closed which may lead to a scrutiny of their transactions. Accordingly ancient precedents have been enforced and

even extended in modern cases, and authorities are cited to the effect that not only is it not permissible to show any irregularity or misconduct, but also *that the lips of witnesses who appeared before them are to be sealed.*

"Other authorities are found which have adopted more liberal and it seems to me more sensible views * * * The rule which may be adduced from the authorities and which seems most consistent with the policy of the law is that *whenever it becomes essential to ascertain what has transpired before a grand jury, it may be shown, no matter by whom; and the only limitation is that it may not be shown how the individual jurors voted or what they said during their investigation, because this cannot serve any of the purposes of justice.*"

These principles were applied in U. S. *vs.* Kilpatrick, 16 Fed., 765, in which an indictment was quashed on the testimony of a grand juror that a certain examiner of the Department of Justice, who had appeared before the grand jury as a witness, had assisted in examination of witnesses and made statements regarding the sufficiency of testimony adduced. Judge Dick, speaking of the nature of testimony given before a grand jury, said:

"*A witness has no privilege to have his testimony treated as a confidential communication,* but he ought to be considered as deposing under all the obligations of an oath in a judicial proceeding; and the oath of a grand juror is no legal or moral impediment to his solemn examination under the direction of the court, as to the evidence before him whenever it becomes material to the administ.-tion of justice."

In People *vs.* Naughton, 38 How. Pr., 430, it was said:

"*There is no secrecy imposed upon a witness before a grand jury either as to the fact of his being called before them, or as to what he testified to.* The minutes of the evidence taken are given to the district attorney. This seems conclusive that the names of the witnesses and their testimony before a grand jury are not required by law to be kept secret."

Many other cases support and emphasize the proposition that the proceedings of a grand jury, the fact that a witness

testified before it, and the nature of his testimony are not necessarily secret, but may always be disclosed to the extent that a due administration of justice requires (State *vs.* Broughton, 7 Ired., 96; State *vs.* Horton, 63 N. C., 595; U. S. *vs.* Reed, 2 Blatchf., 435; Peo. *vs.* Northey, 77 Cal., 634).

In the present case a due administration of justice and the substantial rights of the accused absolutely required that these witnesses should be allowed to testify as to what they said before the grand jury.

The indictment was offered as evidence of probable cause on which a removal was to be ordered, and was in fact recommended by the commissioner. It was the only evidence offered by the prosecution. It was offered as possessing probative force. If there be no obligation of secrecy as to what testimony was adduced before the grand jury which will prevent inquiry in a proper case, and if an indictment may be attacked as a pleading because it was obtained on *improper* and *incompetent* evidence, or, as in New York State, on evidence not *prima facie sufficient* (People *vs.* Ristenblatt, 1 Abb. R., 268; People *vs.* Strong, 1 Abb. N. S., 241), it is, *a fortiori*, open to attack when it is offered as *proof* and as the *sole proof* on which to base a removal. If the prosecution had offered witnesses to prove probable cause, whose testimony was incompetent or irrelevant, assuredly the defendant would have been entitled to destroy its probative force by showing that fact. The same rules of evidence govern before a grand jury as before any other judicial tribunal (U. S. *vs.* Kilpatrick, 16 Fed., 765; 1 Whart. Cr. L., sec. 493).

To hold that the facts stated in an indictment are conclusive because witnesses are presumed to have testified to them before a grand jury is to accord to these facts, when stated in an indictment, greater force than is accorded the direct testimony of the witnesses upon whose testimony the indictment was found.

The doctrine that witnesses are precluded from testifying upon a preliminary hearing to the facts alleged in the indictment because they testified to them before the grand jury is absurd. The application of this principle to a trial would in most instances make it impossible to convict any person accused of crime, because in almost every case those who testified against the accused before the grand jury are those upon whose testimony the prosecution relies to sustain a conviction.

When, therefore, as evidence of probable cause, an indictment is offered which has been found on the testimony of witnesses, the *probative force* of the indictment must be open to attack in the same manner as the probative force of the testimony on which it was obtained (*In re* Woods, 95 Fed., 288).

In the present case there was no attempt on the part of the appellant to disclose mere irregularities occurring in the grand-jury room. All such objections to the indictment as a pleading, it is conceded, may properly be left to the disposition of the trial court (Green *vs.* Henkel, 183 U. S., 249).

The right for which the appellant contends was the right to attack the indictment, not as a pleading, but as *evidence*, by showing the incompetency of the evidence on which it was obtained.

It is no answer that the question of the competency of the testimony on which the indictment was found might be raised by a motion to quash the indictment or a motion in arrest of judgment. Those remedies would be available only after removal. The substantial right on which the appellant now relies is the right not to be removed from the district without probable cause; and when, as the sole evidence of probable cause, an indictment is offered which was obtained without evidence or upon incompetent evidence, he claims the right to show the absence of any evidence before

the grand jury or to destroy its effect as *proof* by showing the incompetency of the evidence on which it was obtained.

But, even though primary evidence is shown to be unattainable, an indictment cannot be considered as secondary evidence of facts alleged in it, unless it presents a clear, consistent, and satisfactory statement of evidentiary facts (*In re* Dana, 68 Fed., 886; U. S. *vs.* Pope, 24 U. S. Int. Rev. Rec., 29).

The present indictment shows on its face that it was drawn and designed as a pleading only and not as a statement of facts from which a judicial finding of probable cause might be made. It states in the language of the statute, the conclusions of the pleader, the result of evidence, not evidentiary facts. That it is intended only as a charge or accusation is shown by the fact that it is drawn in the very language of the statute.

The meager facts which it attempts to allege are set forth in a variety of different counts, each giving a different version of the state of facts which is alleged to constitute the crime. In one count the respondent is charged with receiving the sum of $810 on July 25, 1900, for procuring and aiding to procure a fraudulent contract; in another he is alleged to have received a *check* for $810 on the same day for the same purpose, &c., the evident object being to frame the indictment so that it might be sustained by proof of any one of several transactions. This may be unobjectionable in a pleading, but in an affidavit it has the effect to cast doubt upon the knowledge of the affiant and to deprive the statement of whatever intrinsic force it would otherwise possess as an affidavit of facts known by the affiant to be true (United States *vs.* Greene, 100 Fed., 949; United States *vs.* Greene, 108 Fed., 816)).

This paucity of evidentiary facts and variation in the accounts of the same transaction in the various counts of the indictment, together with the consistent refusal of the prosecution to produce witnesses or documents and to examine

these witnesses when produced, show that the withholding of all evidential facts was designed on the part of the prosecution, and indicate a total misapprehension on its part of the practice under section 1014, and an intent to effect a removal under circumstances which can be styled little less than abduction under form of law.

The alleged hearing accorded to the defendant was a mockery and a sham. Every rule and principle of evidence and justice was violated. The indictment, unindorsed as it was with the name of a single witness, was held to be conclusive evidence against the accused.

The defendant is entitled to have the most favorable inferences drawn from the refusal of the commissioner to allow the questions propounded to be answered. Having offered in good faith to establish facts before the commissioner, and having been denied an opportunity, he is entitled before an appellate tribunal to the presumption that such facts exist (Scotland County *vs.* Hill, 112 U. S., 186; Powell *vs.* Pen, 127 U. S., 688; Rockefeller *vs.* Merritt, 76 Fed., 914; Ankeny *vs.* Clark, 148 U. S., 355).

The conduct of the prosecution upon the alleged preliminary hearing accorded the appellant in preventing the introduction of the primary evidence shown to be conveniently accessible, and the rulings of the commissioner in support thereof, were such as to create a presumption that the testimony of the witnesses, if produced, would have been favorable to the accused (Tayloe *vs.* Riggs, 1 Pet., 591; Hughes' case, 2 East. P. C., 1002; Greenleaf Ev., sec. 82).

"The rule of law," said Chief Justice Marshall in Tayloe *vs.* Riggs, 1 Pet., 591, "is that the best evidence must be given of which the nature of the thing is capable; that is that no evidence shall be received which *presupposes greater evidence behind in the party's possession or power. The withholding of that better evidence raises a presumption that if produced it might not operate in his favor.*"

Primary evidence was shown to be within reach, and secondary evidence was preferred to it. Primary evidence was excluded and the secondary evidence was received as *conclusive*, and the defendant was not permitted to controvert such evidence.

The presumption that the witnesses whose names are indorsed upon a certified copy of an indictment have sworn to the facts alleged in it, and that such an indictment is secondary evidence of those facts, is not of itself sufficient to overcome the presumption of innocence with which the law clothes every person accused of crime. If this presumption was not rebutted by the presumption of innocence alone, it was certainly totally destroyed, not only by the failure of the Government to utilize the primary evidence, which was shown to be conveniently available, *but from the exclusion, in response to the objections of the Government, of all the affirmative primary evidence which was offered to controvert the facts alleged in the indictment* (Dunlap *vs.* U. S., 165 U. S., 502; Kirby *vs.* U. S., 174 U. S., 55; Graves *vs.* U. S., 150 U. S., 121.)

II.

There was no jurisdiction to apprehend the accused, because the complaint on removal was jurisdictionally defective, in that it was made entirely upon information, without alleging a sufficient or competent source of the affiant's information and ground for his belief, and without assigning any reason why the affidavit of the person or persons having knowledge of the facts alleged was not secured.

The whole complaint or affidavit is made on "information and belief." In the verification attached to the complaint the sources of the affiant's knowledge are alleged to be as follows:

First. Official documents with reference to the making of the contract on file in the records of the United States and in the Post-Office Department.

Second. Letters and communications from the Edward J. Brandt-Dent Company with reference to said contract.

Third. The indictment.

Fourth. The bench warrant.

Fifth. "Personal conversations with the parties who had the various transactions with the said George W. Beavers in relation thereto."

The only documents of which copies are attached are the indictment and the bench warrant. The nature of the other documents is not even stated, nor is any attempt made to refer to their contents. The documents and letters, or certified copies of them, should have been attached, as these papers are manifestly the best evidence to show their contents, and some reason should have been assigned as the excuse for the failure to secure the affidavits of those persons, if any, who had personal knowledge of the transactions alleged in the complaint. There is absolutely nothing to show that the papers to which reference is made justify or tend to sustain the charges made by Little. The reference to these papers, therefore, adds nothing to the strength of Little's affidavit. This objection is equally applicable to the information alleged to be derived "from personal conversations with the parties who had the various transactions with the said George W. Beavers in relation thereto." A more indefinite statement could hardly be framed. The names of the persons with whom these supposed conversations were held are not furnished. The nature or substance of these alleged conversations is not set forth, nor is any time or place indicated when or where they took place, nor is there anything to show what these various transactions were. These nebulous conclusions do not state sources of information sufficient to sustain the averments of

the complaint, all of which are upon information and belief. The only sources of information properly stated are the indictment and the bench warrant, and reference may properly be made to these papers merely for the purpose of showing that the indictment was found and the warrant issued in the eastern district of New York.

The bench warrant was referred to solely for the purpose of proving that it was issued in the eastern district of New York, and it has already been shown under part I that the indictment cannot be regarded as equivalent to an affidavit of the facts alleged therein, and therefore the reference to it in the complaint was merely for the purpose of showing that an indictment had been found.

From these references to the complaint it is clear that the information as to the facts which constitute the gist of the offenses charged was derived from sources *other than the indictment and the bench warrant*, and, as these sources are insufficiently alleged, it follows that this important and essential part of the complaint is made upon information and belief without any proper reference to such alleged information.

It is elementary that an affidavit or complaint entirely upon information and belief, without properly setting forth the sources of the affiant's knowledge and the grounds for his belief, is insufficient to confer jurisdiction upon the magistrate to cause the apprehension of the accused (Matter of Blum, 9 App. Div., 571; Blodgett *vs.* Race, 18 Hun., 131; Blythe *vs.* Tompkins, 2 Abb. Pr., 468; People *vs.* Cramer, 22 App. Div., 129; Comfort *vs.* Fulton, 13 Abb. Pr., 276; U. S. *vs.* Sapinkow, 90 Fed., 654; *Ex parte* Hart, 63 Fed., 249).

Such an affidavit, made solely upon information and belief derived from others whose names are not given by the person who swears that he has good reason to believe and does believe that a certain person, naming him, has committed an offense against the laws, describing it, does not meet the requirements of article IV of the amendments to

the Constitution of the United States; that the probable cause mentioned in that article, which is to be supported by oath or affirmation, and upon which a warrant alone can issue, must be submitted to the committing magistrate, who must judge of the sufficiency of the ground shown for believing the accused party guilty. The magistrate, before issuing the warrant, should have before him the oath of the real accuser to the facts on which the charge is based and on which the belief or suspicion of guilt is founded.

In re Commissioners, 3 Woods Reps., 502.

In the United States against Burr, 2 Wheel. Cr. Cases, Judge Innes said:

"The evidence is the oath of a person who has been informed by one not upon oath; and the deponent believes the fact to be true. I make no doubt of the truth of the affidavit; that is that the deponent has been informed that the facts stated are true. *Yet it is no legal evidence, and not being legal evidence, the court cannot act upon it.*"

It was held in construing a section of the Penal Code of the State of California, which statute is very similar to section 145 of the Code of Criminal Procedure of the State of New York, that a complaint on information and belief under such section did not give jurisdiction to issue a subpœna for a witness or a warrant for the arrest of the accused (U. S. *vs.* Collins, 79 Fed., 65; see also Johnson *vs.* U. S., 87 Fed., 187; U. S. *vs.* Polite, 55 Fed., 59).

In *Ex parte* Dimoning, 74 Cal., 164, the court expressed the following view:

"Under these provisions a magistrate has no jurisdiction to issue a warrant without some evidence tending to show the guilt of the party named in the warrant. * * * A mere affidavit in the form of an information containing no evidence and followed by no deposition stating any fact tending to show guilt is insufficient to support a warrant. The liberty of a citizen cannot be violated upon the mere expression of an opinion under oath that he is guilty of a crime."

In referring to complaints made in extradition cases, this court in Rice *vs.* Ames, 180 U. S., Mr. Justice Brown writing the opinion, recently took occasion to say:

"The first two complaints which were dismissed, as well as the first count of the complaint under which the proceedings were finally had, were obviously insufficient, since the charges were made solely upon information and belief and no attempt was made even to set forth the source of information or the ground of affiant's belief. This is bad, even in extradition proceedings, which are entitled to as much liberality of construction in furtherance of the allegations of the treaty as is possible in cases of a criminal nature. * * * A citizen ought not to be deprived of his personal liberty upon an allegation which upon being sifted may amount to nothing more than a suspicion. While authorities on this subject are singularly few, it is clear that a person ought not to be arrested upon a criminal charge upon less direct allegations than are necessary to authorize the arrest of a fraudulent or absconding debtor" (citing Smith *vs.* Luce, 14 Wend., 237; Matter of Bliss, 7 Hill, 187; Proctor *vs.* Prout, 17 Mich., 473).

"So too in applications for injunctions the rule is that the material facts must be directly averred under oath by a person having knowledge of such facts" (Waddell *vs.* Bruen, 4 Ed. Chan., 671; Armstrong *vs.* Sanford, 7 Minn., 49).

But even if it should be granted that a complaint on information and belief without stating facts within deponent's knowledge sufficient to justify a belief, is sufficient to justify the issuance of a warrant, this complaint is further defective in that it fails *to state in any adequate manner the source of affiant's information, and does not show why the affidavits of persons having knowledge were not obtained* (U. S. *vs.* Sapinkow, 90 Fed., 654; Comfort *vs.* Fulton, 13 Abb. Pr., 276).

The rule existing in the State of New York in this respect in attachment cases (Steuben Co. Bank *vs.* Altberger, 78 N. Y., 253; Yates *vs.* Worth, 44 N. Y., 271) is well settled; and there is abundant authority to sustain the proposition

that in such cases affidavits which do not state with precision and sufficiency the source of affiant's information are invalid to sustain an attachment (McCullough *vs.* Alby & Co., 9 N. Y. Supp., 361; Selser Bros. Co. *vs.* Potter Prod. Co., 77 Hun., 313; Harroway *vs.* Flint, 19 Misc., 411).

So, too, in applications for injunctions, the rule is as stated by Mr. Justice Brown in Rice *vs.* Ames, *supra*, page 375—that the material facts must be directly averred by a person having knowledge of such facts. Certainly, a citizen should not be deprived of his liberty on less or slighter evidence than is required by common practice in proceedings that affect only rights of property.

III.

Even if evidence had been presented before the commissioner, the fact that the petition for the writ alleged that the accused was not within the Federal district where and when the crime charged in the indictment is alleged to have been committed in itself entitled the petitioner to the writ of habeas corpus as a matter of right.

The petition alleged (fol. 4) that "the circuit court of the eastern district of New York is without jurisdiction to try the defendant for the offense charged in the said indictment; that at the several times therein mentioned your petitioner was not within the eastern district of New York, but was, and for a long time prior and subsequent to the said several dates mentioned therein, continually within the city of Washington, District of Columbia, which is not within the eastern district of New York."

Upon probable cause being shown, the writ of *habeas corpus* cannot be denied the petitioner, for it then becomes a constitutional right (United States Rev. Statutes, sec. 755; Church on *Habeas Corpus*, section 94; Hurd on *Habeas*

Corpus, 2d ed., 204; *Ex parte* Des Rochers, 1 McAll., 86; *In re* Winder, Fed. Cases, 17867; *Ex parte* Early, 3 Ohio Dec., 105; *Ex parte* Campbell, 20 Ala., 89; Nash *vs.* People, 36 N. Y., 607).

The only manner in which one restrained of his liberty may disclose a *prima facie* case to the court is by a duly verified petition for the writ. If facts are duly alleged in a duly verified petition for a writ of *habeas corpus*, they may be regarded as true, even after the granting of the writ and a return thereto, unless denied by the return or controlled by other evidence (Whitten *vs.* Tomlinson, 160 U. S., 242; Kohl *vs.* Lehlback, 160 U. S., 292; Cuddy, petitioner, 131 U. S., 280). *A fortiori* the allegation should be regarded as true before the issuance of the writ, for the purpose of making it the duty of the court to whom application is made to grant the writ and take proof upon the facts alleged.

If the appellant's contention, that there was no evidence before the commissioner that the accused committed a crime triable within the eastern district of New York, is correct, then obviously this allegation of fact in his petition entitled him to the writ (Green *vs.* Henkel, 183 U. S., 249–261).

But if the view is taken that there was some evidence before the commissioner tending to show that the accused committed the crime charged within the eastern district of New York at the times alleged in the indictment, then the accused claims the right on *habeas corpus* to show by extrinsic evidence his absence from the district at the several times mentioned in the indictment. Such facts, conclusively established, would deprive the commissioner of jurisdiction.

Thus, in Greene *vs.* Henkel, 183 U. S., 249–261, this court said:

"We do not, however, hold that when an indictment charges no offense against the laws of the United States, and the evidence fails to show any, or if it appears that the offense charged was not committed or triable in the district to which removal is sought, the court would be justified in ordering

the removal, and thus subject the defendant to the necessity of making such a defense in the court where the indictment was found. *In that case there would be no jurisdiction to commit, nor any to order the removal of the prisoner.*"

Under the sixth amendment of the United States Constitution the defendant could be tried only in the district wherein the crime was committed. It was incumbent upon the prosecution on the preliminary hearing to establish the presence of the accused within the eastern district of New York at the several times mentioned in the indictment. No attempt to do so, other than by the introduction in evidence of the indictment, was made. This indictment was not evidence, nor was it proof of this fact, as has been shown under part I of this argument; but even if the court intends to so far depart from the heretofore accepted view of an indictment as to consider it evidence, its probative force, as to this fact at least, was wholly destroyed by the uncontradicted sworn statement of the accused that he was not within the jurisdiction at the time when the crime was alleged to have been committed.

If the finding of the commissioner is deemed to have been made upon conflicting evidence, that finding was nevertheless the subject of attack upon this jurisdictional issue. This is not a case where a prisoner seeks a discharge on *habeas corpus* upon the ground that the offense was committed without the jurisdiction where the *locus in quo* has been found by a jury, nor is this a case where a judgment of a court of general jurisdiction imports that this fact was established. No attempt is now made to attack collaterally either the final order, decree, or judgment of a court of general jurisdiction. The place of the commission of the offense is, for the purpose of a preliminary hearing, to be regarded as a fact the establishment and existence of which is essential to the jurisdiction of the commissioner. It is a strictly jurisdictional fact and as such might be controverted

upon *habeas corpus* proceedings, even though such a jurisdictional fact had been previously established by a final judgment of a court of general jurisdiction (Noble *vs.* Union River Logging Co., 147 U. S., 165–173; Scott *vs.* McNeal, 154 U. S., 534; Rodrigues *vs.* East River Savings Inst., 63 N. Y., 460–464; People *vs.* Board of Health, 140 N. Y., 1; Miller *vs.* Amsterdam, 149 N. Y., 288; McLeon *vs.* Jephson, 123 N. Y., 142).

To use the language of this court:—

"It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and the defendant who is imprisoned under and by virtue of it may be discharged from custody on *habeas corpus*" (Hans Neilson, petitioner, 131 U. S., 176, 182; *Ex parte* Lange, 18 Wallace, 163; *Ex parte* Siebold, 100 U. S., 371).

But the record in this case is not entitled to be regarded even as the final judgment of a court of limited or inferior jurisdiction, much less is it to be accorded the same weight and presumption of validity to which a judgment of a court of general jurisdiction is entitled.

The commissioner in proceedings under section 1014 does not hold a "court" (Todd *vs.* U. S., 158 U. S., 278). Nor is he in the constitutional sense a judge (Rice *vs.* Ames, 180 U. S., 371, 378). He is a mere ministerial officer upon whom, while acting as a committing magistrate in such proceedings, is imposed the exercise of duties which are judicial in character (U. S. *vs.* Schumann, 2 Abbs. U. S. Reps., 523; U. S. *vs.* Jones, 134 U. S., 483; U. S. *vs.* Erwing, 140 U. S., 142; *Re* Ellerbe, 13 Fed., 530; *In re* Mason, 43 Fed., 510; *Ex parte* Perkins, 29 Fed., 900; *In re* Perkins, 100 Fed., 953; U. S. *vs.* Hughes, 70 Fed., 972).

He cannot punish for a contempt committed in his presence (*Ex parte* Perkins, 29 Fed., 900; *Re* Mason, 43 Fed.,

510; *In re* Perkins, 100 Fed., 950). And even the power of Congress to invest him with the requisite authority for this purpose has been questioned (*Ex parte* Dole, 7 Phila., 595).

In these proceedings he exercises no judicial functions except the single one of determining whether or not there is probable cause to believe a person accused guilty of a crime (U. S. *vs.* Hughes, 70 Fed., 972). Though not strictly an officer of the court, he has always been considered in the same light as a master in chancery or a register in bankruptcy, and subject to its supervision and control (U. S. *vs.* Allred, 155 U. S., 595). Unquestionably his proceedings must be regarded as proceedings of an inferior order, since his authority is wholly statutory, his duties largely ministerial, and his judicial functions confined to a particular class of proceedings under a particular statute, which designates the course of procedure which the commissioner is bound to follow (U. S. *vs.* Allred, 155 U. S., 595; Black on Judgments, sec. 283 and citations).

The rule is well settled that the finding of a quasi-judicial officer of facts, the existence of which is essential to give him jurisdiction, is not conclusive, but is always open to contradiction upon *habeas corpus* proceedings.

Thus—

"Arbitrators, assessors and all such officers exercising judicial functions cannot take jurisdiction simply by determining that they have it, but they must in fact have it before their decisions can have any validity, and the fact is always, everywhere, when their decisions are challenged, open to inquiry" (People *ex rel.* Wasson *vs.* Schuyler, 69 N. Y., 242–247).

So, too, in cases of courts-martial and delinquency courts and decisions of the Land Department of the Government, these being tribunals of limited and inferior jurisdiction, whether their records recite jurisdictional facts or not, it has been uniformly held that their judgments are open to im-

peachment by extrinsic evidence, showing want of jurisdiction (People *ex rel.* Frey *vs.* Warden, 100 N. Y., 20–26; Adams *vs.* S. & W. R. R. Co., 10 N. Y., 328; Mills *vs.* Martin, 19 Johns, 7; People *vs.* Cassells, 5 Hill, 164; Greenleaf on Evidence, 470; *Ex parte* Watkins, 3 Peters, 207; Hardin *vs.* Jordan, 140 U. S., 401).

The finding of the commissioner upon questions of fact, especially where these facts are essential to confer jurisdiction, has never been regarded as conclusive upon the district judge to whom application for removal is made, nor has any question ever arisen, so far as we are aware, as to the right of the court, either upon application for removal, or upon *habeas corpus*, to review the facts found by the commissioner (*Re* Dana, 68 Fed., 886; U. S. *vs.* Green, 100 Fed., 941; U. S. *vs.* Greene, 108 Fed., 816; Green *vs.* Henkel, 183 U. S., 241; U. S. *vs.* Brawner, 7 Fed., 86; Price *vs.* McCarthy, 89 Fed., 84–86; *Re* Martin, 5 Blatchf., 309; U. S. *vs.* Fowkes, 49 Fed., 50; 3 C. C. A., 394; *Re* Woods, 95 Fed., 288; *Re* Wolf, 27 Fed., 686).

The legal effect of a warrant issued by the chief executive of a State in an interstate rendition proceeding is that it is but *prima facie* sufficient to hold the accused, and the jurisdictional facts recited in such warrant are subject to be rebutted by proof on *habeas corpus* (Corkran *vs.* Hyatt, 188 U. S., 691–711; Robb *vs.* Connolly, 111 U. S., 624; People *ex rel.* Corkran *vs.* Hyatt, 172 N. Y., 176; People *ex rel.* Lawrence *vs.* Brady, 56 N. Y., 182; *Ex parte* Todd, 57 L. R. A., 566; Matter of Cook, 49 Fed., 823; *Ex parte* Hart, 63 Fed., 260; Work *vs.* Connington, 34 Ohio St., 64; Matter of Manchester, 5 Cal., 237; 15 Am. & Eng. Encyl. of Law, 2d ed., 204). So in the State courts it has been uniformly held that whether or not the accused committed the acts complained of while actually present within the demanding State, is jurisdictional, and it is clearly competent in such cases to show in *habeas corpus* proceedings by parol evidence that the accused was not within the demanding State when the

alleged acts were committed, however regular the extradition papers may be (*In re* Mohr, 73 Ala., 508; Wilcox *vs.* Nolze, 34 Ohio St., 320; Hartman *vs.* Aveline, 63 Ind., 344; Jones *vs.* Leonard, 50 Iowa, 106; Hibler *vs.* The State, 43 Texas, 197; Matter of Manchester, 5 Cal., 237).

By analogy the same rule should be applied here.

It is well settled that the presence of the accused in the demanding State at the time of the alleged commission of the offense charged is a prerequisite to entitle the demanding State to the rendition of the accused, and it may be regarded as equally well settled in this court that, where there is *no* evidence before the governor to sustain his finding of fact that the accused was within the demanding State at the times alleged, the court will discharge the prisoner on *habeas corpus* (Corkran *vs.* Hyatt, 188 U. S., 679, 711; Robb *vs.* Connolly, 111 U. S., 624).

Whether the person accused of crime was or was not actually present in the demanding State at the times alleged in the indictment is a jurisdictional fact to be inquired into and determined upon *habeas corpus* proceedings. This is so because of the judicial interpretation placed upon the constitutional provisions relating to the interstate rendition of those who have fled from justice of the demanding State and upon section 5278 of the United States Revised Statutes, which renders the constitutional provision, to which reference has been made, operative. For the same reasons, in proceedings under section 1014, whether the court to which removal is sought has jurisdiction to try the accused for the offense charged, or, in other words, whether the accused did in fact commit the offense charged within the district to which removal is sought, are questions which are the subject of judicial inquiry in *habeas corpus* proceedings.

The provisions of section 1014 direct the officers therein named to arrest and imprison or bail the accused, as the case may be, not for trial in *any court* to which it may be sought to remove him, but "for trial *before such court of the United*

States as by law has cognizance of the offense," and * * * "seasonably to issue * * * a warrant for his removal to the district where trial is to be had"—*i. e.*, where it may lawfully be had.

These provisions are in harmony with that portion of the sixth amendment of the Constitution of the United States which guarantees to persons accused of crime the right of trial by jury within the State and district wherein the crime was committed by providing that—

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury in the State and *district wherein the crime shall have been committed*."

Clearly, in removal proceedings it is quite as essential to establish upon the preliminary hearing or upon *habeas corpus* proceedings that the accused, at the times mentioned in the indictment, was not in fact within the district to which removal is sought, as it is to establish such fact in an interstate rendition proceeding. This is not an attempt to establish an alibi, which is purely a matter of defense to be passed upon by the trial court. It is an earnest effort to controvert an allegation of a fact vital to the jurisdiction of the court, without the existence of which the whole proceeding is rendered null and void. This proceeding presents the stronger case of the two for the application of this doctrine, for here no question of the court's right to interfere with the determination of the chief executive of a sovereign State can arise. Indeed, the only method afforded the accused of reviewing the commissioner's finding and the order of the district judge directing the removal of the prisoner is by writ of *habeas corpus*. Neither can any question of constructive presence of the accused at the times alleged in the indictment within the district to which removal is sought, be raised here. In each count of the indictment the offense charged is alleged to have been com-

mitted by the accused while he was then and there within the eastern district of New York.

It may be said that the accused has waived his right to raise this question for the first time in his petition for the writ by reason of his failure to offer such proof before the commissioner, but such objection can find no authoritative support in the decisions of the courts nor in reason. The question of the jurisdiction of the court may be raised at any stage of a criminal proceeding in the same or in another tribunal. It is never waived by a defendant, and he is not barred from raising it, even because of negligence or delay (Bishop's New Cr. Proc., sec. 316, par. 2; Hughes' Cr. L. Proc., sec. 2509; U. S. *vs.* Rogers, 23 Fed., 658; U. S. *vs.* Crawford, 47 Fed., 566; Dred Scott *vs.* Sanford, 19 How., 402; *In re* Webb, 89 Wis., 354; Mexican Bank *vs.* Davidson, 157 U. S., 208).

The refusal of the circuit court to grant the writ can in no way be regarded as a conclusive finding by it, upon the facts before it, that the accused was not entitled to the writ. The sworn statement of the accused, which, if true, not only entitled the accused to the writ, but to an immediate discharge, stood before the court alone, uncontrolled by other evidence and uncontroverted, and yet it was brushed aside as though it were unworthy of belief or consideration.

"As a witness, a defendant is no more to be visited with condemnation, than he is to be clothed with sanctity, simply because he is under accusation and there is no presumption of law in favor or against his truthfulness."

Allison *vs.* U. S., 160 U. S., 226.

Upon this appeal all questions of law or fact arising upon the record, including the evidence, are open to the consideration of this court, and this appellant is not bound by the finding of the circuit court upon the facts before it that this was not a proper case in which to grant the writ, for in such cases the circuit court has no authority to make con-

clusive findings of fact, as it might do in an action at law upon waiver of a jury, or in cases of admiralty (Johnson *vs.* Sayre, 158 U. S., 115, 116; *In re* Neagle, 135 U. S., 1 to 42; Bond *vs.* Dustin, 112 U. S., 604; Ralli *vs.* Troop, 157 U. S., 386, 415, 417).

CONCLUSION.

It is therefore submitted that the order appealed from should be reversed and the appellant discharged.

BANKSON T. MORGAN,
MAX D. STEUER,
WILLIAM M. SEABURY,
Of Counsel for Appellant.

WASHINGTON, *March* 7, 1904.

APPENDIX.

Proposed Amendment of Section 1014 of the Revised Statutes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That where any person indicted for any crime or offense against the United States in any judicial district, or in any Territory, or the District of Columbia shall be, or be found in any other judicial district, or in any Territory or the District of Columbia, it shall be lawful and it is hereby made the duty of the district attorney of the district or Territory or the District of Columbia in which such indictment is found to deliver, or cause to be delivered, a copy of such indictment certified by the clerk of the court in which the same is pending to a judge or justice of the United States court in the judicial district or to a judge or justice of the highest court of the Territory or the District of Columbia where such indicted person is or may be found; and, thereupon, it shall be the duty of such judge or justice to issue to the United States marshal of the judicial district or Territory or District of Columbia a warrant for the arrest of the person named in the indictment, and upon the return of the warrant with the body of the person so named, the judge or justice shall, upon being satisfied that the person arrested is the person indicted, make an order to the marshal directing the removal of such person to the judicial district or Territory or District of Columbia wherein the indictment is pending, and it shall be the duty of the marshal to execute such order.

"In bailable cases the judge or justice before whom such proceedings are had may admit the defendant to bail for his appearance at the court to which he is held to answer the indictment."

After the passage of the bill by the Senate and its transmission to the House, it is reported in the newspapers that

the following amendment was proposed by the Attorney General:

"But nothing herein contained shall be held to require such judge, justice or commissioner to make an order of removal in any case where it shall be shown that the defendant, by reason of absence from the district from which the indictment is found, could not have committed the offense with which he is charged."